

JACKSON, MURDO & GRANT, P.C.

ATTORNEYS AT LAW
203 North Ewing Street
Helena, MT 59601

NATHAN BILYEU
DAVID C. DALTHORP
SEAN SLANGER
SCOTT M. SVEE
BURT W. WARD
MURRY WARHANK

OF COUNSEL
TERRY B. COSGROVE
JOHN H. GRANT
DAVID L. JACKSON
JACQUELINE T. LENMARK
ROBERT M. MURDO

Direct Dial: (406) 204-4800
Fax: (406) 443-7033
Email: sslanger@jmgm.com

June 18, 2019

Commissioner Galen Hollenbaugh
Montana Department of Labor & Industry
P.O. Box 1728
Helena, MT 59624-1728

Re: Montana Board of Dentistry's New Rule II

Dear Commissioner Hollenbaugh:

Jackson, Murdo & Grant, P.C. represents the Denturists Association of Montana ("Denturists"). On June 7, 2019, the Montana Board of Dentistry ("Board"), during a scheduled board meeting, passed "New Rule II" which limits the Denturist's scope of practice when fitting dentures over implants. The Denturists object to the Board's passing New Rule II. We believe that the Commissioner is required to provide oversight and supervision of the Board's decision regarding New Rule II as required by MCA 37-1-121, prior to the rule being published in the Montana Administrative Register, because New Rule II restrains or potentially restrains trade.

New Rule II undoubtedly restrains trade and competition by requiring denturists to be directly supervised by a dentist, in the dentist's office, in order to fit a denture over an implant. This is despite the fact that we could find no scientific study indicating that direct supervision by a dentist in the dentist's office in any way protects the health and safety of Montana residents nor could we find any evidence of the public being harmed by a denturist practicing without direct supervision.¹ It is telling that the Board voted on New Rule II without any discussion of health and safety issues, likely because no health and safety concerns exist.

The improper purpose of New Rule II seems to be twofold. One, to make it impossible or impractical for denturists to fit dentures over implants because the denturist would need to establish a second office in the dentist's office. Establishing another office is a financial burden and this financial burden establishes a barrier to competition. Two, New Rule II improperly ensures that a dentist will get a financial cut of all dentures being fit over implants, whether the dentist performs the work or not. The dentist would not only receive rent for the office space but some type of payment for the supposed "oversight." This practice will result in more costs being passed on to Montana consumers.

¹ The Denturists requested evidence, through litigation discovery requests, from the Montana Board of Dentistry, proving that Denturists fitting dentures over implants cause public harm but the Montana Board of Dentistry could not provide such evidence.

Under MCA 37-1-121, the Commissioner is required to determine if a board action that restrains competition or trade is made or taken pursuant to a “clearly articulated state policy” and if the restraint is reasonable and necessary to protect the public health, safety or welfare. We do not believe that the Board’s action was taken pursuant to a clearly articulated state policy. The record of the board meeting held on June 7, 2019 shows that the Board did not consider any policy at all and, in fact, had no substantive discussion whatsoever related to New Rule II.

Even if the Board had actually discussed New Rule II, the State of Montana, through the Department of Labor and Industry, has not yet adopted the “clearly articulated state policy” referenced in MCA 37-1-121. We believe that the “clearly articulated state policy” must be adopted pursuant to the Montana Administrative Procedures Act. The Denturists, and the public, must be given the right to comment on the state’s policy, through the rulemaking process, prior to the use of the policy in the review of New Rule II. The Board may then analyze New Rule II pursuant to that properly adopted state policy.

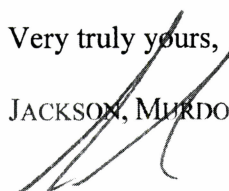
MCA 2-4-102 supports the Denturist’s contention that the “clearly articulated state policy” required by MCA 37-1-121 must be adopted through the rulemaking process. “Rule” is defined as “each agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law **or policy** . . .” MCA 2-4-102(11)(a). The “clearly articulated state policy” that the Commissioner and the Board must use to determine if the restraint or potential restraint of trade is reasonable and necessary is a statement of general applicability that implements a governmental policy. The public must be granted the due process rights to comment on the policy that the commissioner must use to make the restraint of trade determination.

New Rule II is a restraint of trade that provides a barrier to competition and makes dentures more expensive for Montana consumers. As required by MCA 37-1-121 and 37-1-122, we request that the Commissioner protect the public from anticompetitive market participants which raise prices by rejecting New Rule II. We also request that the Department of Labor and Industry promulgate a state policy which the licensing boards are required to use to determine if a board action restrains trade.

Please let us know at your earliest convenience whether the Commissioner plans to review New Rule II so that our client can determine any necessary legal action.

Very truly yours,

JACKSON, MURDO & GRANT, P.C.



Sean Slanger

c: Judy Bovinton
Chief Legal Counsel
Department of Labor and Industry